Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-413

OTIS R. BOWEN as Governor of the State of Indiana;
THEODORE L. SENDAK, as Attorney General of the State of Indiana;
HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana;
THE INDIANA STATE BOARD OF EDUCATION, a public corporate body,

Petitioners,

vs.

UNITED STATES OF AMERICA,
and
DONNY BRURELL BUCKLEY,
ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners[1], Otis R. Bowen, as Governor of the State of Indiana; Theodore L. Sendak, as Attorney General of

[1] The parties in the Seventh Circuit who are considered respondents herein are: United States of America; Donny Brurell Buckley, Alycia Marquese Buckley, by their parent and next friend, Ruby L. Buckley, on

the State of Indiana; Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana; and the Indiana State Board of Education, a public corporate body (hereafter State Defendants) respectfully pray this Court issue a Writ of Certiorari to review two decisions issued by the United States District Court for the Southern District of Indiana, Indianapolis Division (hereafter District Court) prior to decision by the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit). Those decisions were issued on June 2, 1978, and July 11, 1978, in cause number IP 68-C-225. Notices of appeal were filed by the State Defendants on June 30, 1978, and July 21, 1978, respectively, and the cases were docketed in the Seventh Circuit as numbers 78-1871 and 78-2002.

OPINIONS BELOW

The opinions of the District Court have not been officially reported. They were issued on June 2 and July 11, 1978, following remand of the case by the Seventh Circuit on

behalf of themselves and all Negro school age children residing in the area served by original defendants herein; The Board of School Commissioners of the City of Indianapolis, Indiana; Karl R. Kalp, as Superintendent of Schools; Erle A. Kightlinger, as President of the Board of School Commissioners; Jessie Jacobs, Carl J. Meyer, Paul E. Lewis, Lester E. Neal, Constance R. Valdez, W. Fred Rateliff, Members of the Board of School Commissioners of the City of Indianapolis; The Metropolitan School District of Lawrence Township, Marion County, Indiana; The Metropolitan School District of Perry Township, Marion County, Indiana; The Metropolitan School District of Pike Township, Marion County, Indiana; The Metropolitan School District of Warren Township, Marion County, Indiana; The Metropolitan School District of Wayne Township, Marion County, Indiana; The Metropolitan School District of Decatur Township, Marion County, Indiana; The Franklin Township Community School Corporation, Marion County, Indiana; The Metropolitan School District of Washington Township, Marion County, Indiana; The School Town of Speedway, Marion County, Indiana; The School City of Beech Grove, Marion County, Indiana; Citizens for Quality Schools, Inc.; Coalition for Integrated Education; Indiana State Teachers Association.

February 14, 1978. 573 F. 2d 400 (7th Cir., 1978). A copy of the Seventh Circuit's opinion of February 14, 1978, is included in the Appendix attached to the Petition for Writ of Certiorari in No. 77-1614 (hereafter Petition Appendix). Copies of the District Court's opinions of June 2 and July 11, 1978, are attached hereto at pages A-1 and A-13 respectively.

On August 11, 1978, the Seventh Circuit issued an Order remanding the case to the District Court for the "limited purpose of hearing and deciding upon modifications of the July 11th judgment in the nature of alternative remedy" as well as hearing any further evidence on which alternative remedy "is necessary and equitable." See copy attached at page A-47. This limited remand is taking place at the same time as the appeals from the two judgments of June 2 and July 11, 1978, although the briefing schedule for those appeals has been delayed by the Seventh Circuit.

The Order of this Court remanding the case to the Seventh Circuit may be found at 429 U.S. 1068 (1977), and the Opinion of the Seventh Circuit which was vacated and remanded may be found at 541 F. 2d 1211 (7th Cir., 1976). Petition Appendix A-31. The decision by the District Court which gave rise to that appeal to the Seventh Circuit may be found at 419 F.Supp. 180 (S.D. Ind., 1975). Petition Appendix A-68.

Other decisions by the District Court and the Seventh Circuit in this case are 332 F.Supp. 655 (S.D. Ind., 1971), *aff'd.* 474 F. 2d 81 (7th Cir., 1973), *cert. denied* 413 U.S. 920 (1973); 368 F.Supp. 1191 (S.D. Ind., 1973), *aff'd in part, reversed in part, and remanded,* 503 F. 2d 68 (7th Cir., 1974), *cert. denied* 421 U.S. 929 (1975). Those decisions are appended to the Petition for Writ of Certiorari in No. 76-515.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1), 28 U.S.C. § 2101(e), Rule 19(1)(b) and Rule 20 of the Rules of this Court, to review two opinions of the District Court pending on appeal to the Seventh Circuit before judgment is given in such Court, and to review an Order of the Seventh Circuit which has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision because that Court is attempting to decide a federal question in a way in conflict with applicable decisions of this Court.

This case is of such imperative public importance to justify deviation from the normal appellate processes and to require immediate settlement in this Court. Litigation was commenced by the United States in May, 1968, against the Board of School Commissioners of the City of Indianapolis (hereafter I.P.S.), and I.P.S. was found guilty of *de jure* segregation in 1971. 332 F.Supp. 655 (S.D. Ind., 1971). Attempts by the District Court to develop a remedy beyond that school district have all been rejected on appeal. However, those attempts continue, despite the decisions of this Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 299 (1976); *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Austin Independent School District v. United States*, 429 U.S. 990 (1976); *Milliken v. Bradley*, 418 U.S. 717 (1974); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976); *School District of Omaha v. United States*, 433 U.S. 667 (1977); and *Brennan v. Armstrong*, 433 U.S. 672 (1977).

The independent school districts sought to be used for purposes of a remedy in this case have all been found not to be guilty of any *de jure* acts of segregation. 368 F.Supp. 1191, 1203 (S.D. Ind., 1973). The statute alleged to have illegally restricted desegregation of I.P.S. has been found racially neutral, 541 F. 2d 1211, 1220 (7th Cir., 1976), and there has been no finding that that statute caused any interdistrict segregation.

Yet, despite all of the above, the District Court, on June 2 and July 11, 1978, issued two opinions which reinstituted an opinion previously issued by that Court on August 1, 1975, 419 F.Supp. 180 (S.D. Ind., 1975), *aff'd.* 541 F. 2d 1211 (7th Cir., 1976), but vacated and remanded, 429 U.S. 1068 (1977). In those opinions the District Court made a finding that it has not been able to make before, without taking additional evidence, *i.e.*, that the General Assembly of Indiana had acted, in part, with a racially discriminatory intent. Attached appendix pages A-19 and A-21.

Following appeals by several parties from those two opinions, I.P.S., which was the original defendant and is one of the appellants of the latest District Court opinions, filed a motion in the Seventh Circuit asking for a "limited remand" of the case to the District Court to explore alternative remedies. There were no Rule 59 or Rule 60 motions filed in the District Court by I.P.S. Nevertheless, the Seventh Circuit granted the motion, and returned the case to the District Court for what appears to be the fourth extensive trial in this cause.

Thus, after ten years of litigation which includes three full trials, the students of I.P.S., who in 1973, were found to have been denied their constitutional rights, are still waiting for redress of those violations, due to the rejected theories of the District Court and the Seventh Circuit. The Solicitor General has acknowledged the futility of those

theories, stating on page 11 of his brief to this Court in No. 76-515:

> The United States commenced this suit to challenge racial discrimination by and within I.P.S. It prevailed on its claims. Full relief has been delayed for several years, however, while the district court has considered an expanded, inter-district remedy that the United States did not seek. *In our view this delay has been fruitless, because the evidence has not demonstrated any purposeful inter-district racial discrimination of the sort that would justify an inter-district mandatory reassignment of students.* (Emphasis supplied).

This case involves eleven separate and independent school districts with a current enrollment of approximately 152,000 students. Those students and their parents have been in a state of uncertainty regarding the future of their schools and their school careers. That uncertainty would be eliminated if the holdings of this Court were followed by the District Court and the Seventh Circuit. Thus, Petitioners would assert that it is in the public interest that there be a prompt settlement of this important matter, and that this case is, therefore, properly reviewable by this Court pursuant to Rule 20. *Brown v. Board of Education of Topeka,* 344 U.S. 1, 3 (1952); *Carter v. Carter Coal Co.,* 298 U.S. 238, 285 (1936); *United States v. United Mine Workers of America,* 330 U.S. 258, 269 (1947); *Railroad Retirement Board v. Alton Railroad Co.,* 295 U.S. 330, 344 (1935).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the alleged violations in question had any incremental segregative effect on the racial distribution of the school populations of I.P.S. and the suburban schools

when compared to what they would have been in the absence of such alleged violations.

2. Whether a unitary school district can be accomplished within the I.P.S. school district.

3. Whether the Seventh Circuit so departed from the normal course of judicial proceedings by granting a motion to remand while the case was properly on appeal as to call for this Court's power of supervision.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in part, as follows:

> § 1. Citizenship—Due Process of law—Equal protection.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . .
>
> § 5. Power to enforce amendment.—The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 2000c-6 provides, in part, as follows:

> (a) Whenever the Attorney General receives a complaint in writing—
>
> (1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situ-

> ated, are being deprived by a school board of the equal protection of the laws, . . .
>
> and the Attorney General believes the complaint is meritorious and certifies . . . that the institution of any action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall impower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

I.C. 20-8.1-6.5-1 provides:

> Court Ordered Transfers. This chapter concerns the transfer of students for education from one school corporation (transferor corporation) to another school corporation (transferee corporation) in compliance with a court order as described in this section. This chapter applies solely in a situation where a court of the United States or of the State of Indiana in a suit to which the transferor or transferee corporation or corporations are parties

> has found the following: (a) a transferor corporation has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders; (b) a unitary school system within the meaning of such Amendment cannot be implemented within the boundaries of the transferor corporation; and (c) the Fourteenth Amendment compels the Court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such Amendment. This chapter shall not apply until all appeals from such order, whether taken by the transferor corporation, any transferee corporation or any party to the action, have been exhausted or the time for taking such appeals has expired, except where all stays of a transfer order pending appeal or further court action have been denied.

STATEMENT OF THE CASE

I.

Course of Proceedings Below

This Petition arises from opinions issued by the District Court and an Order issued by the Seventh Circuit in the Indianapolis School Desegregation case. A full statement of the case is contained in the Petition filed in 77-1614 which has not been acted upon by this Court. Actions taken since the time of filing that Petition are listed below.

A.

Following remand from the Seventh Circuit on February 14, 1978, the District Court held a hearing on an intra-I.P.S. plan, with only I.P.S., the United States, the intervening Buckley plaintiffs, and the Indiana State Teachers

Association (hereafter I.S.T.A.), an intervening plaintiff, attending. The District Court issued its decision on June 2, 1978. See attached appendix, page A-1. In that opinion the District Court reinstituted its interdistrict transfer opinion of August 1, 1975, in which it had found that the Indiana Transfer Act, I.C. 20-8.1-6.5-1, provided a remedy for the segregation in I.P.S. The District Court stated that, pursuant to the mandate of this Court it would consider *Arlington Heights* and *Washington v. Davis,* and "express its findings in a very short time." Attached Appendix, page A-2.

Notices of appeal to the Seventh Circuit were filed from that opinion by I.P.S., the State Defendants, and the United States. The first notice was filed by I.P.S. on or about June 21, 1978.

On July 11, 1978, the District Court issued its latest opinion, incorporating the findings of the June 2 opinion, and ordering a one-way transfer of black students from I.P.S. to eight suburban Marion County schools so that each such receiving school would have a black student percentage of fifteen percent.

Notices of appeal to the Seventh Circuit were filed from that decision by I.P.S., the State Defendants, the eight suburban schools, and The Housing Authority of the City of Indianapolis. The first notice was filed by the Perry Township Schools on or about July 12, 1978. I.P.S. filed its Notice on July 24, 1978.

On July 25, 1978, the Seventh Circuit held a hearing on three issues, including, allowing I.P.S. to go forward with an intradistrict plan; consolidating the appeals from the two District Court opinions; and whether the Seventh Circuit should, *sua sponte,* issue a stay of the District Court's transfer order. See Attached Appendix, page

A-32. The Court issued its Order on July 28, 1978. Attached Appendix, page A-33.

On August 2, 1978, I.P.S. filed a "Motion of Indianapolis Public Schools for Limited Remand for District Court Consideration of Alternative Remedy Proposals" in the Seventh Circuit. See Attached Appendix, page A-37. The Seventh Circuit granted that Motion on August 11, 1978. Attached Appendix, page A-46.

Applications for stays were filed by the eight suburban schools and the State Defendants, and on August 11, 1978, the District Court issued a stay of its inter-district transfer order until the second semester of the current school year.

II.

Facts Material to Questions Presented

The district Court stated in its second opinion in this case, 368 F. Supp., at 1198, that:

> In other words, it is apparent that as a sheer exercise in mathematics, it would be possible for this Court to order desegregation of IPS on a 58.9%-41.1% basis, or some basis similar thereto, so that no school could, for the time being, be racially identifiable as a black school. . . .

REASONS FOR ALLOWANCE OF THE WRIT

I.

An Interdistrict Remedy is Neither Necessary nor Proper Within Marion County, Indiana.

In 1971, the District Court found that I.P.S. was guilty of acts of *de jure* segregation in the operation of its schools. That finding was affirmed by the Seventh Circuit, and certiorari was denied. Thus, since 1973, I.P.S. has been

awaiting action to totally desegregate its schools. That action has not been forthcoming, however, due to repeated attempts by the District Court and the Seventh Circuit to establish an interdistrict remedy.

The first attempt by the District Court was in 1973, 368 F.Supp. 1191, wherein that Court ordered a one-way transfer of black students from I.P.S. to nineteen separate and independent school districts in seven counties in Central Indiana equal to five percent of the receiving school's population. That transfer was ordered even though the suburban schools were found not to be guilty of any acts of *de jure* segregation. 368 F.Supp., at 1203. Prior to a ruling by the Seventh Circuit, this Court decided *Milliken v. Bradley, supra,* and so the Seventh Circuit reversed the District Court as to the transfers across county lines and remanded the case for further proceedings in regard to transfers to the ten school districts within Marion County, Indiana.

Following another trial the District Court, in 1975, 419 F.Supp. 180, ordered a one-way transfer of black students from I.P.S. to eight of the suburban Marion County schools so that each receiving school would be approximately fifteen percent black. Two suburban schools were not required to receive any students since they were "integrating rather rapidly, as a result of demographic changes." 419 F.Supp., at 185. The Seventh Circuit affirmed that decision, and this Court vacated and remanded for further consideration in light of *Arlington Heights* and *Washington v. Davis.* 429 U.S. 1068 (1977).

A three judge Seventh Circuit panel then issued a three opinion decision remanding the case to the District Court, and that Court merely reinstituted its 1975 opinion with an additional finding that official bodies of the State had the

intent, in part, to keep blacks within I.P.S. and out of the suburban schools.

However, neither the Seventh Circuit nor the District Court considered this Court's opinions in *Dayton, Omaha,* or *Brennan v. Armstrong.* Those cases require that the lower courts consider the incremental segregative effects of the alleged violations on the racial distribution of the school populations of I.P.S. and the suburban schools as compared to what they would have been in the absence of such alleged violations.

The last two decisions of the District Court attempt to justify an interdistrict remedy by holding that the passage of I.C. 18-4-1-1 *et seq.* (hereafter Uni-Gov) by the Indiana General Assembly was done with the intent to segregate the school populations of I.P.S. and the suburban schools. That explanation is presented even though the Uni-Gov act was not passed until 1969, to take effect in 1970, I.C. 18-4-15-2, and even though the District Court previously found segregation in I.P.S. on the:

> . . . two critical dates . . . May 17, 1954, the date of the decision of the Supreme Court of the United States in *Brown v. Board of Education of Topeka* ("Brown 1") 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, 38 A.L.R. 2d 1180, and May 31, 1968, the date on which this suit was filed.
> 332 F.Supp., at 657-658.

Throughout the ten years of this litigation neither of the lower courts has made any findings regarding the effect of the alleged violations on the school populations of I.P.S. and the suburban schools. That is so because the record shows that none of these alleged violations had any effect whatsoever on the school populations within Marion County.

The Seventh Circuit found that Uni-Gov was a racially neutral statute with its main purpose to efficiently restructure civil government[2] within Marion County. 541 F.2d, at 1220. There has never been a finding that Uni-Gov *caused* any interdistrict segregation. In fact, the evidence shows that since the passage of Uni-Gov three of the ten suburban school districts have had substantial increases in black population, and there are increases in the other districts as well. Washington Township Schools, with over 13,000 students, increased from 8.07% to 17.74% black; Pike Township Schools, with almost 4,000 students, increased from 5.16% to 17.62% black; and Lawrence Township Schools, with approximately 9,500 students, increased from 0.78% to 6.40% black. The District Court acknowledged these demographic changes within Marion County by not ordering transfers to Washington and Pike Schools. 419 F.Supp., at 185.

However, the District Court is not willing to acknowledge that black students move to the suburban districts of their choice, *i.e.*, out of the I.P.S. District and into Washington, Pike, Lawrence, or any other district. Instead, the District Court seeks a racial balance of fifteen percent black in every suburban district, a population pattern that has never existed in Marion County and not one that would have existed but for the passage of Uni-Gov.

The issue in this case is, and always has been the desegregation of the I.P.S. schools. There has been no

[2] Uni-Gov consolidated several of the civil governmental functions of the City of Indianapolis and the County of Marion. It did not consolidate schools, which have never been a part of the civil government, and, in addition, did not consolidate the following: police and fire protection, I.C. 18-4-12-6 and 7 and I.C. 18-4-12-35; airport authority and board; health and hospital corporation and board; county department of welfare and board; county home board; building authority, board of trustees, and board of directors; capital improvements board of managers; housing authority; library districts and boards; I.C. 18-4-3-14.

showing in this case that I.P.S. could not be desegregated within its borders. In fact, the District Court acknowledged over five years ago that it could "order desegregation of I.P.S. on a 58.9%-41.1% basis, or some basis similar thereto, so that no school could, for the time being, be racially identifiable as a black school." 368 F.Supp., at 1198. However, the District Court, contrary to the decisions of this Court, seeks a remedy that will work forever. "In the long haul, it won't work." 332 F.Supp., at 678.

Just as the District Court has applied the incorrect standard to determine the extent of the remedy in this case, so also is its finding of "intent" on the part of the General Assembly incorrect as a matter of law and in total disregard of this Court's decisions. The same is true for the finding that the State officials:

> . . . have, by various acts and omissions, promoted segregation and inhibited desegregation within I.P.S., so that the state, as the agency ultimately charged under Indiana law with the operation of the public schools has an affirmative duty to assist the I.P.S. Board in desegregrating I.P.S. within its boundaries . . . 503 F. 2d, at 80.

That finding embraces the District Court's concept that there must be "meaningful desegregation" of I.P.S., 368 F.Supp., at 1198, and that to be "meaningful" a fixed percentage of black students now enrolled in I.P.S. must be transported to the suburban school districts in Marion County. Further, because the State has not merged the ten school systems in Marion County into one school system it has obstructed "meaningful desegregation" which becomes the State's act of segregation and which allows the District Court to invoke its equity power. The majority opinions of the Seventh Circuit also support that concept.

But those findings and that concept violate *Washington v. Davis, supra.* As this Court stated, at page 239:

> Our cases have not embraced the proposition that a law or other official act, [here the creation and existence of school systems other than I.P.S.] without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.

Even if such violations are found, then their significance is to be measured by the legal standard established in *Dayton Board of Education v. Brinkman, supra,* in which this Court said that it is the duty of the District Court to determine how much incremental segregative effect those violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy, then, must be designed to redress that difference. *School District of Omaha v. United States, supra,* and *Brennan v. Armstrong, supra.* The finding of the District Court and the orders of the Seventh Circuit are totally at odds with and in disregard of this Court's decisions in those cases.

It is plain from this record that the lower courts seem unable and unwilling to adhere to the ruling precedents from this Court, and have not reconsidered this case as this Court instructed in January, 1977, 429 U.S. 1068 (1977).

II.

This Court Should Exercise Its Power of Supervision Over the Lower Federal Courts.

The Petitioners would assert that the actions of the Seventh Circuit and the District Court detailed above, show, without a doubt, that those Courts choose not to

follow the decisions of this Court, but instead, seek to justify an inter-district remedy any way that they can. Thus, the Seventh Circuit ignored the remand order of this Court, and once the District Court had issued its decisions, granted a remand motion while the case was properly on appeal and without the movants filing any such preliminary motion in the District Court.

As stated above, the District Court did not consider *Dayton* or its progeny. Now, however, even without valid *Arlington Heights, Washington v. Davis,* and *Dayton* findings in the latest District Court opinions, the Seventh Circuit is remanding the case to the District Court for further *remedy* hearings. Such hearings are inappropriate at this time, and emphasize the need for this Court to give direction to the lower courts.

The action of these courts departs from the normal course of judicial proceedings and calls for this Court to exercise its power of supervision over the Seventh Circuit and to order that Court to remand the case to the District Court with instructions to dismiss the suburban school districts and the State Defendants, and to proceed with the desegregation of I.P.S. within its own boundaries.

CONCLUSION

The State Defendants would respectfully urge this Court to issue the Writ of Certiorari prayed for herein, and to consolidate this Petition with the Petition filed in No. 77-1614.

Respectfully submitted,

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[United States District Court IP 68-C-225]

ENTRY

This case comes before the court once again, this time on the order of the Court of Appeals directing this court to give further consideration to its order of April 7, 1978 denying approval of a skeleton desegregation plan proposed by the defendant Board of School Commissioners of the City of Indianapolis (IPS), and intended by it to be implemented for the 1978-79 school year. The plan is referred to by the Court of Appeals as the Proposed Intradistrict Plan, and will hereafter be so styled herein by its initials (PIP).

The Court of Appeals has posed certain questions to this court, which will be answered *seriatim*. However, it also requests that a determination as to the merits of PIP be made independently of the matter of an interdistrict remedy. With all due respect, this court is simply unable to consider one without the other for the very simple reason that the Court of Appeals has already adopted this court's previous findings, based on the evidence, that an interdistrict remedy is the only practical way to desegregate IPS with any prospect of long term success. A recent pronouncement of the Court of Appeals adopting this finding as the law of the case, and criticizing the United States for doing the very thing it is doing in this rather precipitous appeal is as follows:

> "The Government contends that the mandatory transfer of students between IPS and the suburban schools ordered by the district court is improper. After conceding the import of *Milliken*, the propriety of interdistrict relief, and noting the specific finding of facts found by the district court to have substantially caused segregation in the other districts, the Government concludes the district court's order was an abuse of discretion. We are confused by the Government's reasoning.
>
> "We fail to see how the district court abused its discretion when it was clearly acting within the guidelines of *Milliken*. It was not an abuse of dis-

cretion merely because the Government would have preferred another remedy.

"Furthermore, the Government's arguments are inconsistent. On the one hand, it demands that segregation be eliminated root and branch from within IPS; on the other, it condemns the only relief which can make its demand a reality. We are surprised the Government seriously offers voluntary transfer as an alternative to mandatory transfer as a means to effectuate its goal of complete desegregation. History has taught us that 'freedom of choice' plans produce negligible results. *Green v. County School Board,* 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1967)." *United States v. Board,* 541 F.2d 1211, 1223.

Further, this court believes that the interdistrict remedy previously ordered by it can and should be put into effect at once, wholly apart from the considerations posed by such cases as *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977), and *Washington v. Davis,* 426 U.S. 229 (1976). These cases, requiring a finding of a racially discriminatory intent as a prerequisite to the granting of equitable relief, deal purely and simply with the limits on the power inherent in a federal court of equity to rectify problems arising as a result of segregation.

As a matter of constitutional law, then, the Court of Appeals has held, following the mandate of the Supreme Court, the *Arlington Heights* and *Washington v. Davis* must be considered by this court. This court will do so and will express its findings in a very short time. *Meanwhile, however, it is respectfully submitted that the State of Indiana has provided a remedy which this court has followed, but which has heretofore never been considered by the Court of Appeals because no appellant added defendant school corporation has raised or challenged the point.*

In its Supplemental Memorandum of Decision dated December 6, 1973, 368 F.Supp. 1191 beginning at 1223, this

court recognized both the right and the duty of the General Assembly of Indiana to legislate with a view toward assisting in the process of desegregation. Various possible approaches were pointed out, but with no suggestion as to which would be preferable; indeed, the General Assembly was encouraged to come up with a workable solution of its own.

Shortly thereafter, during its 1974 session, the General Assembly acted promptly upon this court's suggestion, and adopted a method by which any state or federal court in Indiana could order transfers of students from segregated school corporations to other school corporations, and provided a workable method of reimbursement to the transferee corporations. This Act was written, passed, and in force under an emergency clause on February 20, 1974—only 76 days after it was suggested by this court as one possible means of meeting the problem! I.C. 1971, 20-8.1-6.5-1, et seq. The Act provides that three essential elements be met in order for the transfers to take place, as follows:

(1) A transferor corporation must have violated the equal protection clause of the fourteenth amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders;

(2) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of the transferor school corporation; and

(3) The fourteenth amendment compels the court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment.

The foregoing constitute all of the requirements for transfer (save exhaustion of appeals). There is no requirement whatever for *Arlington Heights* or *Washington v. Davis* analysis of the transferee corporation, nor that it

have been guilty of any fourteenth amendment violation. The statute represents purely and simply a State enacted remedial measure, which the General Assembly had undoubted power to enact.

At the time the Indiana Transfer Act (ITA) was passed, this case was on appeal, and continued in this status until April 21, 1975, on which date the Supreme Court denied certiorari as to the decision of the Court of Appeals dated August 21, 1974, 503 F.2d 68. That decision directed this court to have a further hearing to determine whether, under the guidelines of *Milliken v. Bradley,* 418 U.S. 717 (1974), a case decided by the Supreme Court while the Indianapolis case was on appeal, an interdistrict remedy was justified within the area of Uni-Gov. Such a hearing was held, and the question answered in the affirmative on August 1, 1975 (Indianapolis IV), 419 F.Supp. 180. That decision was affirmed by the Court of Appeals on July 16, 1976, 541 F.2d 1211, but the latter decision was vacated and remanded by the Supreme Court on January 25, 1977, 429 U.S. 252. The Court of Appeals then vacated and remanded the decision of this court on February 14, 1978 (mandate received March 31, 1978). The latter decision is as yet unreported.

In its opinion of August 1, 1975, this court specifically stated that in addition to the *Milliken* question it would also consider matters of Indiana law, thus:

> "This Court was specifically directed to determine whether the establishment of the Uni-Gov boundaries of the City of Indianapolis without a like reestablishment of Indianapolis Public Schools boundaries warrants an interdistrict remedy within Uni-Gov in accordance with *Milliken v. Bradley,* 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). Pursuant to such direction, a further evidentiary hearing was held, beginning March 18, 1975, and the parties have submitted both oral argument and briefs, all of which have been considered. The Court has also given consideration to other matters raised by the pleadings and evidence, and to matters of Indiana law, all as will more fully appear." 419 F.Supp. 180, at 182.

After answering the *Milliken* question in the affirmative, this court then immediately launched into a discussion of the ITA, pointed out its essential elements as previously set out in this opinion, and then set out its findings as follows:

> "In the case at hand, we have a suit in which all of the school corporations in Marion County, Indiana are parties, and in which this Court has made, and now reiterates, the following findings:
>
> (a) The defendant Board of School Commissioners of Indianapolis, Indiana (IPS) has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders. *United States v. Board of Sch. Com'rs, Indianapolis, Ind.,* 332 F.Supp. 655 (S.D. Ind. 1971), aff'd 474 F.2d 81 (7 Cir.), cert. den. 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041 (1973).
>
> (b) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of IPS. 'In the long haul, it won't work.' 332 F.Supp. at 678.
>
> "This Court found as a fact in its opinion of July 20, 1973, 368 F.Supp. 1191, et seq., that within the IPS boundaries resegregation of desegregated schools occurs when the percentage of black students in a given school approaches 25% to 30%, more or less. That finding has not been challenged by anyone. Therefore, in a school corporation in which the percentage of black pupils has now reached more than 42% over all, and with the Court of Appeals having ordered this Court to take further steps to desegregate the same, 503 F.2d 80, the Court is placed in an impossible situation unless

the transfer for education of a substantial number of black IPS pupils to school corporations other than IPS is accomplished.

"The Court therefore makes the following additional findings:

(c) The Fourteenth Amendment compels the Court to order IPS to transfer a substantial number of its black students to various added defendant school corporations for education in order to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment." 419 F.Supp. 180, 184.

This court then ordered that a certain number of black students be transferred from IPS to various other school corporations within the Uni-Gov area. In a separate order of the same date, exact numbers of students were assigned to each transferee school. IPS was ordered to identify the transfer pupils and then to submit to this court a final plan for desegregation of the remaining students within IPS. 419 F.Supp. 186. (IPS has not complied with this order in any particular; indeed, it specifically directed its Director of Planning to disregard it and to work up the PIP plan when he brought such order to the attention of the present Board. Testimony of witness Payne, May 30, 1978.)

In making the explicit findings compatible with ITA, as above set out, this court was obviously acting pursuant to the terms of that act. Not one of the transferee corporations named in the accompanying orders of the court challenged these findings on appeal. Rather, they raised the false issue that there was insufficient evidence to support the *Milliken* findings. This very clever maneuver on the part of such added defendants has been successful to date, since the Buckley plaintiffs have sought only to meet the errors asserted by added defendants (and the original plaintiff), and have wholly failed to point out to the Court of Appeals that the remedy provided by the State of Indiana makes it unnecessary to consider the constitutional issues which would otherwise require solution. However,

the time in which a transferee corporation could have questioned this court's findings has long since passed, so there would appear to be no reason why this court's orders, based on ITA, should not be carried out.

Long established practice holds that questions of constitutionality are not to be decided unless such adjudication is unavoidable. *Kelly v. Illinois Bell Telephone Company,* 325 F.2d 148 (7 Cir. 1963). Although application of ITA requires constitutional determinations to be made by the trial court, such have in this case been made long ago and have either been affirmed on appeal or not raised on appeal. They are now *res judicata,* and ITA may and should be applied.

This court was ordered to consider the merits of the PIP plan. Of course, it had already done so insofar as could be done in view of the incompleteness of the submission, when it denied permission to implement the plan on April 7, 1978, after hearing the arguments of counsel on April 6, 1978. However, in order to supplement the record, and to develop facts required to meet the questions posed by the Court of Appeals, a further hearing was had on May 30-31, 1978. The United States offered no evidence, but evidence was presented by IPS, the Buckley intervening plaintiffs, and by intervening plaintiff Indiana State Teachers Association. From the evidence heard the court finds as follows:

(A) PIP is not sound (apart from any interdependence with an interdistrict remedy) as a remedy to be put into effect in 1978-79, because:

(1) It is not complete in that Phase III (the plan for the elementary schools) has not even been begun except for the two-page skeleton filed May 26, 1978 at 4:13 p.m. Even the skeleton had not been adopted at the time it was filed, and was not adopted until some sort of a hurry-up meeting was held on Memorial Day, May 29.

(2) It cannot be implemented as to Phase II (upper elementary) because Phase II (the details of which were only filed on May 26, 1978 at 4:13 p.m.) depends upon the

use of two buildings which are not even in existence, and which will not be completed for a matter of years. Most of the other proposed upper elementary schools require remodeling or additions which will require until January, 1979 to complete.

(3) It should not be implemented as to Phase I (high schools), as it is unnecessarily complicated and substantially destroys the stability of presently stable elementary schools.

(a) There are only two high schools which are substantially out of phase which the Board's own guidelines. Both schools have an unduly high black population, but this has come about since the filing of this action as a matter of demographic movement. It is not necessary to reorganize the high school patterns in the whole city to change the racial balance in two schools.

(b) The PIP plan provides that elementary students may only attend schools located in their ultimate high school attendance areas, so that many present elementary attendance areas will be split.

(4) PIP has been discussed either minimally, or not at all, with IPS teachers, with the exception of the options aspect. A new plan of massive reassignments which has not been explained to the teachers will not function well, if at all.

(5) The main selling point of the PIP plan was the options plan for the elementary schools. Only 20% of the elementary children, or their parents, made a choice under the options plan. As a result IPS has *voluntarily* abandoned the options plan, except for a few pilot schools.

(6) While IPS was attempting to sell its options plan to parents, teachers, pupils, and the public, it gave no general publicity to the fact that PIP in its entirety was in reality a massive desegregation plan.

(a) Consequently, the public, parents, teachers, and pupils are unprepared for PIP.

(b) The above facts will hinder or defeat the success of PIP, according to IPS's own witnesses.

(7) IPS to this date has not furnished the court with any estimate as to the number of students who will be dislocated and reassigned from the present schools under PIP.

(8) PIP represents a "massive 'fruit basket' scrambling of students . . ." which both this court, 332 F.Supp. 655, 678, and the Court of Appeals have said "'won't work' in the long run." Moreover, all witnesses who testified on this point at the hearing of May 30-31, including the defendant Superintendent of Schools of IPS, agreed with this statement.

(B) The representation that PIP cannot be implemented for 1978-79 unless it be approved at about the present time is incorrect.

(1) It could not be implemented for 1978-79 even if it was approved at this time, because:

(a) The options plan has already been abandoned for lack of interest.

(b) The Phase II buildings cannot be built or altered in time.

(C) If PIP were presently approved and implemented for 1978-79, and at some later time an interdistrict remedy were found appropriate, (answering the precise question put, although an interdistrict remedy is already appropriate under ITA) the implementation of PIP might well interfere with, and in fact prevent entirely the formulation and implementation of interdistrict remedy.

Of the many Supreme Court cases on desegregation, probably the most quoted case after *Brown I*, and certainly the easiest to understand, is *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, (1971). The last two paragraphs of the text in that decision read as follows:

"At some point, these school authorities and others like them should have achieved full compliance with

this Court's decision in Brown I. The systems would then be 'unitary' in the sense required by our decisions in Green and Alexander.

"It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." 402 U.S. 1, 31.

As stated above, the United States presented no evidence at the current hearing. However, its counsel made an opening statement in which he said, or said in substance, the following:

(1) IPS schools can be desegregated with the IPS only PIP plan.

(2) By desegregated is meant that ". . . if you take all these schools and make them 60-40 or something like that, then theoretically you have fulfilled the constitutional mandate."

(3) The Government will not predict and is not concerned with what will happen after a massive racial balancing plan is put into effect, so long as it is theoretically sound on paper from the standpoint of numbers.

(4) The Attorney General is opposed to any plan which would involve suburban schools.

It seems obvious to this court that if PIP is ordered implemented by the Court of Appeals, the United States will immediately declare IPS desegregated and get out. Indeed, under *Swann* it will be argued by added defendant transferee corporations and perhaps by the Attorney General as well that the case must forthwith end, except for monitoring. The Buckley plaintiffs, representing all black school children in IPS do not want this result, the trial court does not want this result, and the Court of Appeals did not appear to want it when it spoke as set out on pages 1 and 2 of this opinion.

(D) The explanation for it being termed "counterproductive" to put the PIP into effect for the year 1978-79 (or any year) is :

(1) It is unsound, as explained in (A).

(2) It might well block further consideration of any interdistrict remedy, as explained in (C). It is submitted that, contrary to the tentative opinion of the Court of Appeals appearing at the top of page 6 of its May 17 order, such would produce probable injustice.

One other matter remains, as to matters on appeal, and that is the matter of the reassignment of students presently attending the Harry E. Wood High School. This court originally denied the proposed method of reassignment on no very good basis except that it appeared to be a part of a wholly unsound package (PIP). The court now reverses itself and approves the proposed Wood plan, if it has jurisdiction to do so; if it does not have such jurisdiction, it respectfully suggests that the Court of Appeals order such plan approved.

The court detects a note of urgency in the May 17 order, which is not inappropriate in view of the length of time this case has been in the courts. However, this is no routine case, and in the end should result in implementation of the innovative plan designed by the General Assembly of Indiana, which might well serve as a guide to other troubled school districts.

It is not as if nothing were being done in Indianapolis to relieve segregation. Approximately 9,500 students have been bused daily since 1973 without serious incident; all high schools meet or approach PIP guidelines save two; there are no longer any all white schools at any grade level. The only remaining problem of substance is the several 90% or more black elementary schools, and this problem will be alleviated by application of ITA and relatively minor readjustments thereafter.

ORDER

Having answered all questions put to it by the Court of Appeals, this court now returns to old business. If IPS can draw up a completely new, city wide, Phase III elementary school plan where none at all now exists, and do it in eight weeks (which is testimony about which this court has some reservation), it can surely designate the pupils for transfer to transferee school corporations, and adjust the remaining IPS students even more quickly. It was ordered to make such plans in 1975, and has not done so. The reason is clear—the IPS superintendent testified that IPS did not want to give up any students or close any schools. This may be a reason, but it is not an acceptable excuse.

It is therefore considered and ordered that the defendant Board of School Commissioners forthwith proceed to formulate a plan for the transfer of black students to the various transferee school corporations, in the same numbers and grade levels, all as set out in this court's judgment dated August 1, 1975. IPS may consult with the transferee schools, but will be sole judge as to what students will be transferred, and will not delay its plans for purposes of consultation. Such plan should be completed within six weeks from this date, or sooner if possible.

Further orders will be made regarding the implementation of such plan pursuant to ITA at the same time that this court announces its findings and conclusions as required by the Court of Appeals in its remand of February

14, 1978. It is anticipated that the same will be forthcoming in three weeks, more or less, but said planning should begin on receipt of this order.

All of which is considered and ordered this 2nd day of June, 1978.

/s/ S. Hugh Dillin, Judge

[United States District Court IP 68-C-225]

MEMORANDUM OF DECISION

This cause comes before the court pursuant to remand from the United States Court of Appeals for the Seventh Circuit, 573 F.2d 400 (1978).

To summarize briefly the more recent rulings in the case, the Court of Appeals held in 1976 that the action of the General Assembly of Indiana in passing legislation in 1969 to enlarge the City of Indianapolis to include all of Marion County, with the exception of three cities and towns, ("Uni-Gov"), while at the same time repealing a previous law providing that the boundaries of the civil city and the school city would, generaly speaking, be coterminous, had an obvious racial segregative impact, and was a substantial cause of interdistrict segregation. U.S. v. Bd of Sch. Com'rs of City of Indianapolis, 541 F.2d 1211 at 1220. Is also held that action of the added defendant Housing Authority of the City of Indianapolis ("HACI") in locating all of its public housing projects within IPS borders, although it had the authority to place them in the suburbs, produced discriminatory effects both within IPS and the suburbs. *Id.*, p. 1223. The Court then found that this court's order, 419 F.Supp. 180 (1975), which ordered the transfer of black students from IPS to various suburban schools within Marion County, was in accord with the principles of Milliken v. Bradley, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974), and affirmed the same, 541 F.2d 1211 (1976).

The Supreme Court of the United States vacated the judgment and remanded the case to the Court of Appeals

for further consideration in light of Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), and Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). On remand the Court of Appeals reaffirmed that the passage of Uni-Gov and its companion legislation meets the requirements of *Milliken* and therefore can be used as a basis for imposing an interdistrict remedy if the district court finds that the General Assembly, in enacting the series of legislation, acted with a racially discriminatory intent or purpose. 573 F.2d 400, 408. The purpose of the remand, therefore, is for this court to make findings as to the intent of the General Assembly, as well as to the intent of HACI and the Metropolitan Development Commission of Marion County ("Commission") with respect to the location of public housing.

In *Arlington Heights* the Court laid down some of the criteria to be considered in determining whether a racially discriminatory purpose entered into a challenged action. "The impact of the official action—whether it 'bears more heavily on one race than another,' Washington v. Davis, 426 U.S. at 242—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. . . ." 50 L.Ed.2d 450, 465.

The Court then went on to list other evidentiary considerations:

> (1) "The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes . . .
>
> (2) "The specific sequence of events leading up to the challenged decision . . .
>
> (3) "Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role.

> (4) "Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.
>
> (5) "The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports. . . ." *Id.*, pp. 465, 466.

The court will now consider the application of such criteria to the facts of this case.

I. Historical Background

The situation of the Negro in Indiana, 1800-1971, was described in this court's first opinion in this case, 332 F.Supp. 655 (1971). The facts set out therein have never been challenged, and are a part of the law of this case. Such facts show that Negroes were held as slaves in Indiana, the provisions of its constitution to the contrary notwithstanding, that they had no right to vote, nor to serve in the militia, nor to intermarry with whites, nor to give testimony as a witness in a case involving a white party. The laws against serving in the militia and against intermarriage were not repealed until 1936 and 1965, respectively.

Further facts are that the Indiana Constitution of 1851 prohibited Negroes and mulattoes from coming into the state. Until after World War II, Negroes were rarely admitted, save on a segregated basis, to theatres, public parks, State parks, schools, or public hospitals. Housing was segregated in Indianapolis and Marion County until a date past the filing of this suit in 1968. Negroes were discouraged from purchasing homes in "white" neighborhoods by realtors who refused to show them such homes, by use of a "two-price" system, and by advertising housing for "colored" in Indianapolis newspapers. Racial covenants barring Negroes were made a part of various

plats in suburban areas, and were enforced by the courts until 1948. An Indianapolis ordinance in 1926 made it a crime for a Negro to live in a white area, and vice versa. Pioneering Negroes who succeeded in penetrating a white neighborhood were harassed by threatening and obscene telephone calls and rocks hurled through windows. Custom and usage dictated that Negroes were not to stay overnight in small towns, and their departures was enforced by the police.

In the area of schools, Negroes, mulattoes and their children were barred from admission to the common schools by an act of 1861. In 1869, after the adoption of the Fourteenth Amendment, a law was adopted which provided for the education of Negro children, but only in segregated schools. The Supreme Court of Indiana held as recently as 1926 that Negro children were not entitled to admission in common schools provided for the education of white children, a policy legislatively recognized again in 1935. Desegregation, on a phased basis (one grade per year), was not required until 1949.

The added defendant suburban school corporations of Marion County, the record shows, have entered into a great number of interdistrict cooperative educational and vocational plans with each other and with districts outside the county. However, they have entered into none with IPS, although IPS has initiated such discussions. The only perceived difference between IPS and other districts (other than size) is race.

In 1868 Indianapolis erected a new school house and, anticipating the 1869 legislation, assigned the old building on Market Street for the education of Negro children. Thus the Indianapolis schools started educating the Negro child on a segregated basis and continue to do so until this day, inasmuch as several all-black elementary schools remain in use.

From the foregoing, it will be noted that Indiana, unlike most states in the north and west, practiced *de jure* segregation by act of the General Assembly, just as was true in the southern and border states. Brown v. Board of Education, 347 U.S. 483 (1954), therefore imposed upon Indiana and upon Indiana communities such as Indianapolis, which had practiced segregation in its schools, an instant duty to desegregate.

However, the law of this case is that successive School Boards of the City of Indianapolis after *Brown* continued policies of *de jure* segregation in the operation of IPS up until the time of this court's first decision in 1971, aided and abetted by officials of the State of Indiana. During the same period of time (1954-1971), the HACI, with the approval of the Commission, built numerous public housing projects in IPS territory, inhabited 98% by Negroes, but none in the territory of any of the suburban Marion County defendants, all of whom have consistently opposed such housing projects. The suburban defendants also unanimously opposed consolidation of all Marion County schools, as proposed pursuant to the Indiana School Reorganization Act of 1959, and they were successful.

As heretofore set out, the law of Indiana from the adoption of its Constitution of 1851 until 1959 was that the boundaries of a school city and of a civil city were coterminous. 332 F.Supp. 655, 675, n. 86. In 1959 the Indiana School Reorganization Act, I.C. 1971, 20-4-1-1, et seq., provided that reorganized districts need not be coterminous, but in 1961 it was again provided by Acts 1961, ch. 186, § 1, I.C. 1971, 20-3-14-1, et seq., that in counties having a city of the first class (Marion County), the extension of the boundaries of a civil city would automatically extend the school city boundaries, unless mutually agreed to the contrary. Thus for the period 1851-1969, except for the two year period 1959-1961, it was the law that any annexation of territory by the City of Indianapolis carried with it a like annexation of territory by IPS.

II. Sequence of Events Leading to Repeal of 1961 Act and the Enactment of Uni-Gov

The added defendant Commission and its president participated in drafting Uni-Gov. It had done planning studies with respect to population growth in Marion County and as to where schools should be located. The Mayor of Indianapolis, a former member of the IPS School Board, appointed a task force for Uni-Gov called the Greater Indianapolis Progress Committee. All members of the General Assembly from the Marion County area were ex officio members of this committee. In short, Uni-Gov did not arise from some general impulse on the part of the entire General Assembly, but was envisioned, packaged and sold to the General Assembly by various Marion County and Indianapolis officials.

A public meeting was held November 27, 1968 and a draft was discussed. Such draft made no mention of schools, but opposition to the inclusion of schools was voiced at the meeting. Thereafter, a section was added to the draft providing that schools were excluded from the consolidation and expansion of the City of Indianapolis, and a separate bill was drafted, introduced, and passed by the General Assembly under an emergency clause, repealing that section of the 1961 Act which provided that the boundaries of the City of Indianapolis and IPS would be coterminous. Following all this, the Uni-Gov Act was passed.

The Mayor, when testifying as a witness, gave no educational or governmental reason for excluding the schools from the reach of Uni-Gov. He simply (and no doubt accurately) stated that the Uni-Gov bill would not have passed had the schools been included. The inference is that the representatives elected by the vote of suburban residents—many of whom had recently moved to the suburbs from the central city to escape the threat of desegregation posed by the filing of this very suit in 1968—would have voted against Uni-Gov but for exclusion of the schools.

III. Departures from Normal—Legislative History

The evidence discloses no departure from normal procedural sequence, but the substantive departure is obvious. After 133 years of dehumanizing the Negro citizen through its laws, the General Assembly began in 1949 to attempt to right its previous wrongs. It enacted the school desegregation act in that year, and in subsequent years repealed the anti-miscegenation law, and other vestiges of past discrimination. In 1961 it enacted the law restoring the long established rule that the school city of Indianapolis should expand with the civil city.

Following the decision in Brown v. Board of Education, 347 U.S. 483, in 1954 it became the duty of every member of the General Assembly, under his oath to support and defend the Constitution of the United States, to assist in desegregating the Indianapolis school system. The necessity of obtaining a wide dispersal of Negro school children in order to secure a stable plan was obvious in 1969, as a result of the dreary experience of resegregation in such places as Atlanta, Georgia, Washington, D.C., and elsewhere, which was widely known at that time. However, the General Assembly reversed its forward progress and departed from its long established boundary policy by repealing the crucial section of the 1961 Act, and eliminating the schools from Uni-Gov.

No further legislative history of Uni-Gov and companion legislation is available, since the Indiana General Assembly does not keep any record of its proceedings save the daily journal which records only motions and the results of roll calls.

IV. Finding and Conclusions—Legislation

Considering all of the foregoing facts, it is perfectly obvious to this court, and it therefore finds, that the actions of the General Assembly above discussed were done, at least in part, with the racially discriminatory intent and purpose of confining black students in the IPS school sys-

tem to the 1969 boundaries of that system, thereby perpetuating the segregated white schools in suburban Marion County.

It was virtually identical action on the part of the General Assembly of Delaware in passing the Education Advancement Act of 1968 which caused the district court in Delaware to order the consolidation of the 88% black public schools of Wilmington with white suburban schools of New Castle County. Evans v. Buchanan, 393 F.Supp. 428 (1975), aff'd, per curiam, 423 U.S. 963, 96 S.Ct. 381, 46 L.Ed.2d 293 (1975). In that case the General Assembly enacted a bill calling for the reorganization of Delaware schools, but provided that the boundaries of the Wilmington schools, which contained a huge majority of black students, could not be changed. The Delaware court concluded that the Act precluded the State Board of Education (charged with the duty of desegregating Wilmington) from considering the "integrative opportunities" of redistricting in New Castle County in any meaningful way, that when the Act was passed the State Board had not satisfied its obligation to eliminate the vestiges of *de jure* segregation in the Wilmington schools, and that therefore the Act constituted a suspect classification, with no compelling justification therefor, since it had a significant racial impact on the policies of the State Board. 393 F.Supp. 428 at 442, 443.

V. The Housing Violations

Once again this court refers to the previous record in this case. It found as a fact in its 1973 opinion as follows: ". . . [T]here can be little doubt that the principal factor which has caused members of the Negro race to be confined to living in certain limited areas (commonly called ghettos) in the urban centers in the north, including Indianapolis, has been racial discrimination in housing which has prevented them from living any place else." 368 F. Supp. 1191, 1204. This finding was specifically approved by the Court of Appeals in its 1976 opinion. 541 F.2d 1211,

1222. Various aspects of racial discrimination in housing by realtors licensed by the State, by state courts and legislative bodies, and by private citizens, have been set out in part I hereof.

Against this background of racial discrimination, can it be said to be a mere benign coincidence that HACI and the Commission located all public housing projects within IPS boundaries? This court thinks not and specifically holds that the action of such official bodies in locating such projects within IPS, as well as the opposition of the suburban governments to the location of public housing within their borders, were racially motivated with the invidious purpose to keep the blacks within pre-Uni-Gov Indianapolis and IPS, and to keep the territory of the added suburban defendants segregated for the use of whites only. The Court of Appeals has already agreed that the record shows a " 'purposeful, racially discriminatory use of state housing. . . .' " 541 F.2d 1211, 1223.

The evidence clearly supports the foregoing findings. As the Court of Appeals for the Sixth Circuit has said:

> "A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively established that their action or inaction was a consistent and resolute application of racially neutral policies. *NAACP* v. *Lansing Board of Education,* 559 F.2d 1042, 1046-47 (6th Cir., 1977) quoting *Oliver* v. *Michigan State Board of Education,* 508 F.2d 178, 182 (6th Cir., 1974)."

In this case it was obvious that the natural, probable and foreseeable result of erecting public housing projects wholly within IPS territory would be to concentrate poor blacks in such projects and thus to increase or perpetuate public school segregation within IPS. The Deputy Mayor

of Indianapolis testified that HACI never even examined sites outside the then City of Indianapolis (IPS territory). No consideration whatever was given to locating housing projects so as to reduce public school segregation, and then bring necessary municipal services to the project sites. When faced with the choice of locating a public housing project on the west side of Emerson Avenue (IPS territory) or across the street on the east side of such avenue (Warren Township territory), HACI chose the IPS side of the street. This deliberate choice was intended to, and did, perpetuate Warren Township as a segregated white community and IPS as a heavily black community.

The attitudes and motivation of the Metropolitan Development Commission have been the same. Its chief administrator testified that its demographic studies failed to take race into account in projections of population movement, or in considering the location of schools, and did not require housing developers in the suburbs to pledge a nondiscriminatory policy in either the sale or rental of property. This same Commission, after the filing of this suit, refused to permit the defendant School Board to relocate Crispus Attucks High School to a site at West 30th Street and Guion Road—a white neighborhood. The separation of the races, both in housing and in schools, has been an unspoken, but intentional policy of the Commission.

Certain of the added defendant suburban school corporations, joined by HACI, have attempted to avoid the foregoing facts, and the inferences naturally flowing therefrom, by arguing that HACI had no power to locate its housing projects outside the former City of Indianapolis (IPS territory), notwithstanding that the statute which enabled its creation, I.C. 8-7-11-1, et seq., provided from the date of its enactment in 1937 that the area of operation of a city includes the area of the city and the area within five miles of its territorial boundaries. I.C. 8-7-11-3(g)(1).

Added defendants refer to the United States Housing Act of 1937, and its requirement for cooperation agreements to be entered into by the public housing agency and

the "governing body of the locality involved." 42 U.S.C. § 1415(7)(b)(i). They then contend that since no such agreements were executed between HACI and the Marion County Council, the building of housing units in the suburban townships was impossible.

The foregoing argument, in the opinion of this court, is sheer nonsense. The section of the Indiana statute in question was analyzed by the Indiana Supreme Court in Edwards v. Housing Authority of Muncie, 215 Ind. 330, 19 N.E.2d 741 (1939). The holding was that:

> "Normally the county government has jurisdiction outside of the area of incorporated cities and towns in respect to certain matters, but the city has power to annex additional territory, which, for governmental purposes within the scope of the authority of the city, is removed from the jurisdiction of the county. It may have been the legislative intention that either a county or a city housing authority might assume jurisdiction to act in respect to territory outside of the area of cities, but adjacent thereto, and no doubt the authority which first undertakes to exercise jurisdiction acquires exclusive jurisdiction. . . ."

According to the evidence, HACI is the only housing authority ever established in Marion County to date, so there can be no question as to its power to have built its units in the unincorporated suburbs at any time. As to the section of Federal law quoted, "the locality involved" simply refers to the city, town, or county governmental unit which has established the housing authority—in this case the City of Indianapolis. Indianapolis did, of course, execute such a cooperation agreement. The statute has to do, *inter alia,* with the guarantee by the Federal Government of bonds issued by the local housing authority. Obviously, the cooperation desired is that of the governmental agency which chartered the housing authority—not that of some other unit (here the Marion County Council) which has no interest in the matter.

VI. Application of Dayton v. Brinkman

In Dayton Board of Education v. Brinkman, — U.S. —, 97 S.Ct. —, 53 L.Ed.2d 851 (1977), the Supreme Court vacated the judgment of the Court of Appeals for the Sixth Circuit, 539 F.2d 1084 (1976), which had approved a district court desegregation plan for the Dayton schools. The plan involved districtwide racial distribution under which the racial distribution of each school would be brought within 15% of the black-white population ratio of Dayton.

The trial court had found a three-part "cumulative" constitutional violation by the Dayton School Board—the lack of any affirmative effort to achieve racial balance in its schools, the former use of optional attendance zones, and its rescinding of resolutions passed by a previous Board which had acknowledged segregative practices and called for remedial measures. The Supreme Court criticized each of such findings for various reasons, and held that in any event there was no justification for imposing a systemwide remedy without evidence proving constitutional violations having a systemwide impact. It therefore remanded with directions to take additional evidence and, if constitutional violations be found, to determine how much incremental segregative effect such violations had on the racial distribution of the Dayton school population as presently constituted, as compared to what it would have been in the absence of such constitutional violations.

Following *Dayton*, the Court of Appeals has directed this court to make the same determinations. The record shows that as of April 30, 1974, HACI owned 2,395 apartment units of various sizes, other than those held for rent exclusively to the elderly (R. 1975, pp. 164-173 incl.). Estimating three school age children per unit, it is apparent that more than 7,000 pupils would have been afforded a desegregated education in the schools of added defendants had the housing units been placed outside IPS. Further, the evidence is that the neighborhoods around housing projects tend to become integrated, so that others would have moved to the suburban housing areas. The total

would approximate the number of students which this court proposes to transfer.

VII. The Legislative Remedy

As set out in this court's entry for June 2, 1978, the General Assembly of Indiana has enacted a statute, I.C. 1971, 20-8.1-6.5-1 et seq., pursuant to which a court may order transfers of students from one school corporation to another as an aid to desegregation. The Act requires three findings to be made in order to justify the transfers:

> (1) A transferor corporation must have violated the equal protection clause of the fourteenth amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders;
>
> (2) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of the transferor school corporation; and
>
> (3) The fourteenth amendment compels the court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment.

The foregoing constitute all of the requirements for transfer (save exhaustion of appeals). There is no requirement whatever for *Arlington Heights* or *Washington v. Davis* analysis of the transferee corporation, nor that it have been guilty of any fourteenth amendment violation. The statute represents purely and simply a State enacted remedial measure, which the General Assembly had undoubted power to enact.

In its opinion of August 1, 1975 this court made the three required findings as the basis for its order to IPS to transfer, and to the suburban school corporations to

receive certain numbers of black school children. Since such findings were not found unsupported by the evidence on appeal, they would seem to constitute the law of the case.

To eliminate any doubt, however, this court now states its findings anew, as follows:

(a) The defendant Board of School Commissioners of Indianapolis, Indiana (IPS) has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders. United States v. Board of Sch. Com'rs, Indianapolis, Ind., 332 F.Supp. 655 (S.D. Ind. 1971), aff'd 474 F.2d 81 (7 Cir. 1973), cert. den. 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041 (1973).

(b) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of IPS. "In the long haul, it won't work." 332 F.Supp. 655, 678.

(c) The Fourteenth Amendment compels the court to order IPS to transfer a substantial number of its black students to various added defendant school corporations for education in order to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment.

The general transfer law of Indiana is quite liberal. It provides that a transfer may be made upon application by the parent of any child who resides in the transferor corporation "if it feels the child may be better accommodated in the public schools of another school corporation of this state or of an adjoining state. . . ." I.C. 1971, 20-8.1-6.1, et seq. Inasmuch as transfers have long been a part of the Indiana educational system, it is only natural that such a method was selected by the General Assembly as one method of assisting in bringing about desegregation in systems such as IPS. The use of such statute does not require the courts to consider Dayton-type rules, but only what is necessary to desegregate the transferor corporation.

VIII. Conclusions of Law

Pursuant to the findings of fact herein it is concluded as a matter of law that this court's previous order and judgment of August 1, 1975 should in all things be reinstated, with that part thereof pertaining to the transfer of pupils revised so as to apply to the school year 1978-79. Surplus IPS teachers should be hired, if required, by the transferee school corporation.

The court further concludes, based on its previous finding that the State has an affirmative duty to assist in desegregating IPS, that the defendant Superintendent of Public Instruction should forthwith develop a comprehensive in-service training program as described in Bradley v. Milliken, 402 F.Supp. 1096, 1139 (E.D. Mich. 1975), aff'd 540 F.2d 229 (6 Cir. 1976), aff'd *sub nom* Milliken v. Bradley, — U.S. —, 97 S.Ct. —, 53 L.Ed.2d 745 (1977). Such program shall be participated in by all teachers and staff of the transferee schools prior to and during the coming 1978-79 school year. Any and all expenses of developing and administering such program shall be paid by the State of Indiana.

The court further concludes that the limitations on the construction or renovation of public housing projects by HACI should be expanded to include any type of low-rent housing, as that term is defined and used in 42 U.S.C., Chapter 8, §§ 1401, et seq.

Orders will be entered in accordance herewith.

Dated this 11th day of July, 1978.

/s/ S. Hugh Dillin, Judge

JUDGMENT

The court having this day filed a memorandum of decision in the above entitled action (Indianapolis V), containing various findings requiring orders and judgments, such orders and judgments are hereinafter set out.

Recognizing that some or all of the parties to this proceeding may wish to appeal the judgments entered herein by this court as to them, and as a convenience to all parties, this court will designate by separate subnumber that particular judgment directed against each particular defendant or defendants, in order that the parties appealing may properly designate in any notice of appeal filed herein that particular judgment or judgments so appealed. The defendant The Board of School Commissioners of the City of Indianapolis, Indiana will be referred to as "IPS." The matter of transfer of pupils will be accomplished and continued in accordance with the applicable provisions of this court's Memorandum of Decision (Indianapolis IV), entered August 1, 1975, and its Memorandum of Decision (Indianapolis V), this day entered herein, all of which provisions are incorporated in each subparagraph as if set forth therein.

a. IP 68-C-225A. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Decatur Township, Marion County, Indiana, 567 Negro students to be enrolled in grades 1-9 for the 1978-79 school year, and to make continuing transfers of such students for ensuing school years, until further order of the court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly.

b. IP 68-C-225B. It is ordered and adjudged that IPS is directed to transfer to The Franklin Township Community School Corporation, Marion County, Indiana, 326 Negro students to be enrolled in grades 1-9 for the 1978-79 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly.

c. IP 68-C-225C. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Lawrence Township, Marion County, Indiana, 930 Negro students to be enrolled in grades 1-9 for the 1978-79 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly.

d. IP 68-C-225D. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Perry Township, Marion County, Indiana, 1,555 Negro students to be enrolled in grades 1-9 for the 1978-79 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly.

e. IP 68-C-225E. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Warren Township, Marion County, Indiana, 1,206 Negro students to be enrolled in grades 1-9 for the 1978-79 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly.

f. IP 68-C-225F. It is ordered and adjudged that IPS is directed to transfer to The Metropolitan School District of Wayne Township, Marion County, Indiana, 1,383 Negro students to be enrolled in grades 1-9 for the 1978-79 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly.

g. IP 68-C-225G. It is ordered and adjudged that IPS is directed to transfer to the School City of Beech Grove, Marion County, Indiana, 329 Negro students to be enrolled in grades 1-9 for the 1978-79 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the court. Said transferee

school corporation is ordered to accept such transfer students and enroll them accordingly.

h. IP 68-C-225H. It is ordered and adjudged that IPS is directed to transfer to the School Town of Speedway, Marion County, Indiana, 237 Negro students to be enrolled in grades 1-9 for the 1978-79 school year, and to make continuing transfers of such students for ensuing school years, until the further order of the court. Said transferee school corporation is ordered to accept such transfer students and enroll them accordingly.

i. IP 68-C-225I. It is ordered and adjudged that IPS prepare and file with the court, on or before August 1, 1978, a plan, or alternative plans, for the final desegregation of its schools, taking into account the transfer of pupils ordered herein.

j. IP 68-C-225J. To the extent that the transferee school corporations above named may be required to hire additional teachers because of the transfers herein ordered, they are each ordered and directed to give first consideration to hiring, and to hire, teachers made surplus to IPS as a result of such transfers.

k. IP 68-C-225K. The defendant Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana, is ordered to develop a comprehensive in-service training program for use by all teachers and staff of the transferee school corporations. Such program shall cover such fields as teacher expectations, human relations, minority culture, testing, the student code of conduct and the administration of discipline in a desegregated system for all school personnel. The program shall also include an explanation of the school desegregation cases, beginning with Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

l. IP 68-C-225L. The transferee school corporations hereinabove named are ordered to administer said training program as an on-going program, and conduct the same during the school year and just prior to the opening of school.

m. IP 68-C-225M. The cost of developing and administering said in-service training program shall be paid by the State of Indiana.

n. IP 68-C-225N. It is ordered and adjudged that The Housing Authority of the City of Indianapolis be, and it is permanently enjoined from constructing or in any manner acquiring any structure within the area served by IPS for the purpose of offering the same, or any parts or portions thereof, for rent, and from renting the same to families of low income, other than to elderly families, as such terms are defined in 42 U.S.C. § 1402(2).

o. IP 68-C-225O. It is ordered and adjudged that The Housing Authority of the City of Indianapolis be, and it is permanently enjoined from renovating its presently owned public housing project known as Lockefield Gardens, or any part thereof, for the purpose of offering the same, or any parts or portions thereof, for rent, and from renting the same to such families of low income, other than elderly families.

The court retains continuing jurisdiction of this action, and the parties thereto, together with the right to modify or supplement any orders or judgments herein or heretofore made.

Dated this 11th day of July, 1978.

/s/ S. Hugh Dillin, Judge

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
July 18, 1978
Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, etc., et al., *Intervening Plaintiffs,*	
No. 78-1800 vs.	No. IP 68-C-225
THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, *Defendant-Appellant.*	S. HUGH DILLIN, *Judge.*

The oral argument referred to in this court's order of June 30, 1978, is rescheduled to Tuesday, July 25, 1978, at 11:00 a.m. Oral argument of this appeal is limited to twenty (20) minutes for each side.

Counsel are hereby directed to be prepared to discuss the following:

1) that portion of the district court's order entered on June 2, 1978, which denied permission to adopt its plan for assignment of ninth grade students for September, 1978;

2) plaintiffs-intervenors' motion for consolidation of appeals, filed in appeal No. 78-1871 on July 17, 1978; and,

3) the status of any appeals from the judgment entered on July 11, 1978, and whether that judgment should be stayed pending appeal.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
(Argued July 25, 1978)
July 28, 1978
Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
DONNY BRURELL BUCKLEY and ALYCIA MARQUESE BUCKLEY, etc., et al., *Intervening Plaintiffs,*	
No. 78-1800 vs.	No. IP 68-C-225
THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, *Defendant-Appellant.*	S. HUGH DILLIN, *Judge.*

ORDER

On June 2, 1978 (on remand from this court), the district court again considered the Intradistrict Plan proposed by appellant Board (IPS), and again denied approval. IPS appealed. This court expedited the appeal insofar as the June 2 order denied IPS permission to implement its plan for assignment of ninth grade students (Phase I). We left consideration of the appeal from the June 2 order in other respects for a later time. We heard oral argument on Phase I July 25.

In the meantime, on July 11, 1978, the district court entered judgment, directing IPS to transfer to suburban school districts specified numbers of Negro students who will be enrolled in grades one through nine for the 1978-79

school year, although the judgment does not specify the number of students about to enter the ninth grade who are to be transferred. If Phase I were implemented now, it would control the school assignments of students who will enter the ninth grade for the 1978-79 school year. Thus if both were implemented forthwith, both could (to the extent ninth graders were transferred under the judgment) affect the school assignment of the same students entering the ninth grade for 1978-79, and a possibility of conflict would be present. On the other hand, if the July 11 judgment is not implemented until a later year, it will not affect any students who enter ninth grade for the school year 1978-79.

Accordingly, we invited argument not only on the merits of Phase I, but also on the possibility that the July 11 judgment might be stayed.

We are advised that appeals have been taken by the suburban school districts from the July 11 judgment and they have requested the district court for a stay pending appeal. We have considered the possibility of issuing a stay *sua sponte*, but prefer to have that question considered first by the district court.

We are impressed by the short time available until the opening of school in the transferee districts and the practical problems of absorption into those schools of some 6,500 transferred students. We also note the appellate history of the orders for interdistrict transfer in this case. We therefore deem it a remote possibility that the July 11 judgment will be implemented as to the 1978-79 school year whether stayed under the usual standards applied on appellate review or because of the practical difficulties of proper implementation without severe educational disruption for all students concerned.

Thus it is our best judgment that Phase I can be implemented for students entering the ninth grade for the 1978-79 school year without conflict arising out of transfer, under the July 11 judgment, of any of the same students.

Implementation of Phase I will at least guarantee that no 1978-79 ninth grade in any school in the IPS system will be more than 60% black, whereas without Phase I a ninth grade would be as much as 85% black. In our view Phase I is the only additional step toward desegregation that can take place during the 1978-79 school year, and it is a step in the right direction for that year. We therefore hold that the district court abused its discretion in refusing to permit implementation of Phase I for 1978-79.

We do not view implementation of Phase I for 1978-79 as in any sense a final remedy. Assuming that the July 11 judgment, or some modification thereof, goes into effect for some later school year, adjustments in Phase I will clearly be necessary with respect to such year and future years, and in any event, given the history and circumstances of this case, we do not view the grant of permission to IPS to implement its proposed Phase I in 1978-79 as curtailing the power of the court to order other interim or final intradistrict or interdistrict remedies. Clearly, such implementation will not detract from the appropriateness of interdistrict transfers if it be finally determined that a so-called interdistrict violation occurred.

Accordingly, insofar as the order entered June 2, 1978 denied IPS permission to implement Phase I, it is reversed and the district court is directed to enter an order permitting the implementation of Phase I. Jurisdiction over Appeal No. 78-1800 with respect to all remaining portions of the order of June 2 is preserved in this court. When the record on the appeals from the July 11 judgment is docketed here, this court will direct a prehearing conference under Rule 33, F.R.A.P., and give favorable consideration to consolidation of the remaining portions of Appeal No. 78-1800 with the appeals from the July 11 judgment. Should IPS desire, as suggested at argument, to propose modification of the July 11 judgment, so as to provide for two-way transfers or the like, this court will entertain an application to give leave to the district court to consider such proposal, notwithstanding the pending of the appeals.

The Clerk of this court is directed to enter judgment accordingly. The mandate of this court shall issue July 31, 1978.

SWYGERT, Circuit Judge, concurring. I reluctantly concur. My reluctance is based on my concern that, despite assurances of counsel to the contrary, any implementation of the intracity plan may have an effect on our full consideration of an overall final and permanent desegregation plan, whether intradistrict or interdistrict. I am satisfied, however, that our order today is couched in terms that will not impair the flexibility that is essential to a full consideration of all aspects of the case.

Despite the legalisms that have shrouded this case from the beginning, the case is primarily concerned with the educational welfare of the black pupils in the Indianapolis school system. After hearing argument on July 25, I am persuaded that the stability of pupil assignments for those entering the ninth grade is not endangered by our order. These pupils will be moving to a different school regardless of whether Phase I is implemented as part of an interim intradistrict plan. Whether they will be transferred to a suburban school at a later date is at this point hypothetical.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 78-

(Appeals from July 11, 1978 Order)

UNITED STATES OF AMERICA,
Plaintiff-Appellee

DONNY BRURELL BUCKLEY, et al.,
Plaintiffs-Intervenors-Appellees

v.

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al.,
Defendants-Appellants.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

MOTION OF INDIANAPOLIS PUBLIC SCHOOLS FOR LIMITED REMAND FOR DISTRICT COURT CONSIDERATION OF ALTERNATIVE REMEDY PROPOSALS

The Indianapolis Public Schools (IPS) hereby moves the Court for limited remand of the July 11, 1978 judgment of the lower court in order to permit the trial court to hear, and to make findings on, alternative remedy plans and related evidence. In support of this motion IPS shows as follows:

1. In the July 28, 1978 order of the Court of Appeals, on expedited consideration of the 9th grade aspect of the intradistrict remedy plan in No. 78-1800, the Court stated (Slip Op. 5):

> Should IPS desire, as suggested at oral argument, to propose modification of the July 11 judgment, so as to provide for two-way transfers or the like, this court will entertain an application to give leave

to the district court to consider such proposal, notwithstanding the pending of the appeals.

See also 7/24/78 Memorandum of Indianapolis Public Schools on Consolidation, Stays, and Further Proceedings, pp. 3-8.

2. By August 15, 1978, in compliance with the District Court's orders, IPS will submit Remedy Proposal A, an exclusively one-way, blacks-only plan for interdistrict desegregation that assigns 6,533 IPS black students in grades 1-9 to the eight virtually all-white school districts in Marion County as specified in the District Court's July 11, 1978 order. At the same time, IPS will submit two pupil reassignment alternatives: Proposal B would, on a two-way basis, assign some 6,533 white pupils from these eight districts to IPS, as well as 6,533 black IPS pupils to these outside school districts; Proposal C would reassign pupils on a two-way basis between IPS and the outside school districts in order to eliminate the current pattern of interdistrict school segregation throughout Marion County. In order to avoid delay in trial court proceedings on remedy, IPS at the same time will also submit extensive and detailed offers of proof from recognized school desegregation and housing experts showing (a) the full *cross-district* impact of the three interrelated constitutional violations previously found by the district court (i.e., the IPS *de jure* segregation, official state custom and usage of racial segregation in schools and housing, and intentionally segregative school district boundary action by the legislature) *and* (b) the extent to which each of the three proposals does and/or does not fit the violations by overcoming their continuing, "combined effect." *Evans* v. *Buchanan*, — F.2d — (3rd Cir. July 24, 1978) Slip Op. 22.[1]

[1] *Cf. also, e.g., Brinkman v. Dayton Bd. of Educ.*, — F.2d — (6th Cir. July 28, 1978); *Penick v. Columbus Bd. of Educ.*, — F.2d — (6th Cir. July 14, 1978) Slip Op. 58-61; *United States v. Columbus Municipal Separate School District*, 558 F.2d 228, 231 (5th Cir. 1977); *United States v. T.E.A.* (Austin), 564 F.2d 162, 174-176 (5th Cir. 1978) (all applying a similar impact standard in so-called intradistrict cases following *Dayton*).

This procedure will allow all parties promptly to file written objections to the proposals and to present any alternatives and offers of rebuttal proof; as a result, the issues for a remedy hearing can be sharply focused, and there need by no delay in the evidentiary hearing before the District Court.[2] Together the three remedy alternatives and related offers of proof present the range of available interdistrict relief which must be examined in light of the evidence concerning the cross-district impact of the violations to insure that *any* remedy ordered is tailored to overcome all of the current effects of the constitutional violations found. *Milliken* v. *Bradley*, 433 U.S. 267, 281 (1977); *Dayton Bd. of Educ.*, 433 U.S. 406, 420 (1977); *Milliken* v. *Bradley*, 418 U.S. 717, 744 (1974); *Keyes* v. *School District No. 1*, 413 U.S. 189, 201-203, 208-214 (1973); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16-17, 25-26 (1971); *Davis* v. *Board of School Commissioners*, 402 U.S. 33, 37 (1971).

3. This Court in its February 14, 1978 remand specifically directed the District Court to consider and to make specific findings concerning the cross-district impact of the constitutional violations found in order "to fashion an appropriate remedy." 573 F.2d 400, 410; *also* 573 F.2d at 405 and n.4, 410 n.22, and 414. Although IPS (acting in a plaintiff capacity on interdistrict issues) filed a timely motion and subsequent memorandum in the District Court requesting permission to present relevant evidence, *inter*

[2] In addition, IPS at the same time will submit proposals and offers of proof relating to relief ancillary to pupil reassignments and the allocation of the costs of desegregation as appropriate under Milliken v. Bradley, 433 U.S. 267 (1977). Although the District Court's July 11, 1978 order (¶K-M) does address one aspect of these issues (in-service training, and its costs, for suburban staff), the District Court has not considered nor ruled upon any other aspect. As a result, the appeals from the July 11, 1978 order may not divest the District Court of jurisdiction to hear these supplemental matters on which it has never ruled. In all events, trial court hearing and determination of the issues of ancillary relief and costs at the same time as the pupil reassignment remedy issues will allow this Court to determine this case, finally, on one consolidated appeal rather than by the protracted process of piecemeal appellate review.

alia, on these remedial issues, the District Court has declined to rule on this request.[3] Instead, without the benefit of any evidentiary hearing nor the submission of *any* interdistrict remedy plans, the District Court on July 11,

[3] IPS also requested the opportunity to present evidence on the wholly inequitable and racially discriminatory nature and educational harm of exclusively one-way, blacks-only interdistrict desegregation proposals. The District Court has also declined to rule on this request; instead, the District Court has ordered a one-way plan without permitting a record to be made on the issue. When the Wilmington School District was allowed to present such evidence in shaping appropriate relief, the district court and court of appeals in that metropolitan school case were able to consider the issue in the light of evidence as well as controlling legal standards, rather than allow any preconceived notions of what is an "appropriate" remedy to control their judgments. The resulting contrast to the July 11, 1978 order here is startling. In rejecting just such blacks-only, exclusively one-way interdistrict desegregation, the courts in *Evans v. Buchanan*, on the basis of a complete record, held:

> [L]ike its reference to the legislative voluntary transfer plan, in which only three white students took part, the State Board's [one-way, blacks-only] "plan" carried with it the tacit assumption that only—and that all—black students benefit from transferring to a white environment, and not *vice versa*. The district court properly refused to accept such an untenable assumption. In this regard, the State Board's solution simply failed to meet the standard for voluntary plans set forth in *Green v. County School Board*, 391 U.S. 430, 439 (1968): "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." . . . [A]s stated by the district court, perhaps the most glaring weakness in the State Board's plan is that it would improperly shift the "entire burden of the remedy" onto "those whose rights have been violated." 435 F.Supp. at 840. Precepts of equity lie at the heart of any desegregation remedy, and fairness and justice furnish the fiber and sinew of those precepts. The district court recognized this, and we refuse to fault its judgment in perceiving what it considered to be the basic inequity in the Board's proposal: "One would find it difficult to create a more graphic paradigm of an inequitable remedy than one which assigns to those who have been wronged the responsibility of correcting those wrongs." *Id.*

Evans v. Buchanan, — F.2d — (3rd Cir. July 24, 1978) (en banc) Slip Op. 14-15 and *see also* n.7 at Slip Op. 14. At the very least, then, it is plain error for the District Court to refuse to allow a record to be made on the issue.

1978, entered an order adopting a very limited, blacks-only, exclusively one-way interdistrict proposal. Although the July 11 opinion plumbs the record to make the requisite findings concerning intent and the existence of interdistrict violations, the District Court simply fails to take the next step required by this Court in its remand, to evaluate the full impact of the interdistrict violations found in order to tailor the remedy to fit the combined effect of these violations.[4] At the very least, then, reversal and remand of the July 11, 1978 order is inevitable on the appeals therefrom if only (a) to allow IPS (and any other party so desiring) to make a record on the combined cross-district impact of *all* of the constitutional violations and (b) to require the District Court to make the impact findings and to tailor relief accordingly as mandated by this Court's remand of February 14, 1978. At the July 25, 1978 oral argument on the questions posed by this Court, no party seriously questioned the necessity for such a determination of the cross-district impact of the violations.

4. In all events, the Supreme Court has expressly held that remedy hearings are required on the alternative remedial proposals available in order to allow trial courts to fashion relief which is fully effective and equitable in

[4] The District Court's July 11, 1978 opinion, in passing, addresses the impact of only one aspect of the violations found: the cross-district impact on blacks of the intentionally segregative location of public housing projects within IPS. 7/11/78 Slip Op. 13-14. The opinion (and hence the order), however, do *not* even purport to address nor to remedy the additional combined interdistrict segregative impact of (a) the displacement of whites to suburban districts caused by the intentionally segregative placement of black public housing projects within IPS, (b) the confinement of black families and white families to separate schools within and without IPS caused by the total state housing violations, including the longstanding official custom and usage of almost complete racial segregation throughout Marion County evidenced by the diverse public laws, practices, subsidies and sanctions recited by the District Court, (c) the substantial separation of IPS black pupils from suburban white pupils caused, in this context, by the cross-district impact of the longstanding IPS *de jure* violation, *and* (d) the further intentional cross-district confinement of black and white school children to separate schools resulting from the General Assembly's intentionally segregative boundary actions.

overcoming the continuing impact of the constitutional violations found:

> The *obligation* of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. . . . The matter must be assessed in light of the circumstances present *and the options available* in each instance. . . . It is *incumbent* on the district court to weigh th[e] claim [that a school board's proposed plan promises to root-out all of the effects of the constitutional violations] in light of the facts at hand and in light of *any alternatives* which may be shown as feasible and more promising in their effectiveness.

Green v. *County School Board,* 391 U.S. 430, 439 (1968) (emphasis supplied). The District Court, therefore, has an obligation to hear the merits of the range of remedial alternatives submitted by IPS *and* to assess their adequacy in view of the controlling principles of equitable relief and the evidence on the scope and impact of the violations. At the very least, the District Court has an obligation to evaluate and to specify the full cross-district impact of the violations found so that an appropriate interdistrict remedy may be finally fashioned and ordered, as already specifically directed by this Court. 573 F.2d at 410, 414. In making its decision, the District Court must make specific findings showing the relationship between the plan approved and the combined effect of all of the violations found. To date, the District Court has never held the required hearing nor made the requisite findings on the available interdistrict remedial alternatives and the total cross-district impact of the violations.

5. It is not entirely clear whether the pending appeals from the July 11, 1978 judgment, absent a limited remand, technically bar the District Court from considering the alternative remedy plans and related evidence on the scope and impact of violation by divesting it of jurisdiction. *Cf.* 7 *Moore's Federal Practice* § 60.30[2] and 62.05; 9 *Moore's Federal Practice* § 203.11; *Kelley* v. *Metro. City Bd. of Educ.,* 463 F.2d 745 n.3 (6th Cir. 1972); *Ideal Toy Corp.* v. *Sayco Doll Corp.,* 302 F.2d 623, 625 (2nd Cir. 1962); *United States* v. *Board of School Commissioners,* 503 F.2d 68, 81-82 (7th Cir. 1974). In all events, the proposed remand to the District Court for an evidentiary hearing and findings will resolve all doubts and allow the trial court to hear the alternative remedy proposals and related evidence concerning (a) the scope and impact of the constitutional violations, (b) the alleged inequity, ineffectiveness, and harm of blacks-only one-way plans, (c) relief ancillary to pupil reassignments, and (d) the assessment and allocation of desegregation costs. Such a remand will also serve the salutary purpose of allowing the District Court to make the complete record of evidence and findings necessary to enable this Court finally to review this long-protracted case in one piece.[5] The alternative to such a remand hearing is yet more piecemeal appellate review and delay.

6. Pending hearing and ruling on the limited remand, the record should remain for use in the District Court pursuant to Rule 11(e), F.R.A.P.

CONCLUSION

In view of the foregoing, and in accordance with this Court's July 28, 1978 order (Slip Op. 5), IPS prays that this Court provide a limited remand to the trial court while preserving ruling on all issues raised by the pending appeals. The limited remand to the District Court shall be for the purpose of hearing the alternative remedy plans and related evidence proffered by IPS (as well as any alternatives, objections, modifications, and rebuttal of any opposing party) and District Court determination by de-

[5] Ordering such a remand at this stage will *not* decide the pending appeals from the July 11 order insofar as they relate to intent and the existence of a so-called interdistrict violation at all. That issue will be preserved for decision on the pending appeals and can be consolidated for review with all appeals from the District Court's ruling on the remand.

tailed findings of which alternative remedy (including pupil reassignment, ancillary relief, and allocation of costs) is necessary and equitable to overcome the combined inter-district effect of all of the constitutional violations previously found. Pending hearing and ruling on the partial remand, the record should remain for use in the District Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing Motion of Indianapolis Public Schools For Limited Remand For District Court Consideration of Alternative Remedy Proposals have been served on all counsel of record by first class mail, postage fully prepaid, this 1st day of August, 1978.

Paul R. Dimond

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 11, 1978

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
DONNY BRURELL BUCKLEY and
ALYCIA MARQUESE BUCKLEY, etc.,
et al.,
Intervening Plaintiffs,
Nos. 78-1996 thru 78-2006, and
78-2039

vs.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, AND THE SUPERINTENDENT OF SCHOOLS, PRESIDENT AND MEMBERS OF THE BOARD OF SCHOOL COMMISSIONERS, et al.,
Defendants-Appellants.

Appeals from the
United States
District Court for
the Southern
District of Indiana,
Indianapolis Div.
No. IP 68 C 225
S. HUGH DILLIN,
Judge.

ORDER

This matter comes before the court upon the filing of the following documents:

1. The "MOTION OF INDIANAPOLIS PUBLIC SCHOOLS FOR LIMITED REMAND FOR DISTRICT COURT CONSIDERATION OF ALTERNATIVE REMEDY PROPOSALS" filed by the Indianapolis Public Schools on August 2, 1978;

2. The "RESPONSE IN OPPOSITION TO 'MOTION OF INDIANAPOLIS PUBLIC SCHOOLS FOR LIMITED REMAND FOR DISTRICT COURT CONSIDERATION OF ALTERNATIVE REMEDY PROPOSALS' " filed by Metropolitan School District of Lawrence, Warren and Wayne Townships on August 7, 1978;

3. The "MOTION FOR STAY PENDING APPEAL" filed by Metropolitan School District of Perry Township, Marion County, Indiana on August 7, 1978; and

4. The "MOTION OF APPELLANTS, BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, ET AL., FOR TEMPORARY RETENTION OF RECORD IN DISTRICT COURT UNDER F.R.A.P. 11(c)" filed by Board of School Commissioners of the City of Indianapolis, its Superintendent and members on August 7, 1978.

On consideration thereof, IT IS ORDERED, that this cause is remanded to the district court for the limited purpose of hearing and deciding upon modifications of the July 11th judgment in the nature of alternative remedy, plans and related evidence proffered by IPS (as well as any alternatives, objections, modifications, and rebuttal of any opposing parties) and hearing and making additional findings upon further evidence offered by any parties on the issue of which alternative remedy (including pupil reassignment, ancillary relief, and allocation of desegregation costs) is necessary and equitable to overcome the combined effect of all the constitutional violations pre-

viously found by the district court. Pending the determinations of the district court on this limited remand, and also for the convenience of counsel in preparing their briefs on appeal, the record shall be retained in the district court until further order. All issues raised by the pending appeals, including but not limited, to intent and the existence of any interdistrict violation at all are preserved for decision by this court on the pending appeals and such subsequent appeals as may be filed from the orders of the district court on this limited remand.

This court assumes that the district court will rule upon the various motions for stay of the July 11, 1978 judgment pending appeal prior to the commencement of the 1978-1979 school session. And upon that assumption, this court defers ruling on the motions for stay filed in this court.